



D a v i s G r a h a m & S t u b b s L L P

March 8, 2012

**Via E-Mail and US Mail**

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Re: Interim Response Cost Negotiations  
Anaconda NPL Site: Cost Challenge Summary

Gentlemen:

At the conclusion of our February 6, 2013 meeting, the United States requested that Atlantic Richfield Company ("AR") submit written comments to further explain AR's challenges to EPA's demand for payment of past costs for the Anaconda Smelter NPL Site ("Anaconda Site").

The United States' past cost demand related to the Anaconda Site, as presented in EPA's October 1, 2012 letter, is \$23,266,422.20 covering the period from August 1, 2002 through December 31, 2010. As explained during the February 6<sup>th</sup> meeting, AR comments are directed to approximately \$6,550,000 of EPA's cost demand for the Anaconda Site. Table 1 summarizes AR's Anaconda Site cost challenges which are categorized under two general headings: (a) Cost Documentation; and (b) Inconsistency with the NCP. Table 2 provides more detailed information related to the Cost Documentation challenges, and Exhibit 1 to this letter includes a spreadsheet summary and copies of progress reports related to EPA's claim for funds provided to Anaconda-Deer Lodge County (ADLC). AR's comments on the draft Consent Decree will be provided under separate cover next week.

Submitted Pursuant to FRE 408 / Confidential Settlement Materials  
Protected by Court Order for Consent Decree Negotiations

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An explanation of AR's specific challenges to EPA's cost claims under each cost category follows.

#### Cost Documentation

Included under the Cost Documentation heading is AR's challenge to one duplicate invoice (and related allocated charges) in the amount of \$17,909. The duplicate invoice is a CDM voucher under contract number 68-W-5-0022.

Table 2 identifies cost documentation received from EPA that relates to funds EPA provided to the Montana Department of Environmental Quality (MDEQ) and the Department of Interior – US Fish and Wildlife Service (DOI/USFWS) under certain Interagency Agreements (IAGs). Table 2 identifies the vouchers for which AR has questions that were produced with EPA's cost documentation. Related to the MDEQ costs (\$142,407), EPA produced MDEQ progress reports. However, AR is unable to locate a progress report which provides an explanation of MDEQ's activities at the Anaconda Site and corresponds with the vouchers referenced on Table 2.

AR believes EPA's cost documentation provided in support of funds provided to DOI/USFWS under certain IAGs is also deficient. Four vouchers (identified in Table 2) support EPA's demand for reimbursement of \$300,928. AR has reviewed the corresponding DOI/USFWS progress reports, and the documentation fails to provide any description of what funded response activities were performed at the Anaconda Site. A different documentation deficiency is noted in review of EPA's documentation provided to support EPA's claim for \$153,516 in other funds provided to DOI/USFWS under an Anaconda Site IAG. As set forth in Table 2, EPA has produced 8 vouchers to support recovery of \$153,516 in funds provided to DOI/USFWS. The DOI/USFWS progress reports covering this period, January 2008 through December 2010, describe very limited activity (two of ten reports show meeting attendance and document review, others report no activity) for the Anaconda Site during the covered period. Thus, the EPA documentation does not support the demand for recovery of \$153,516 in funds EPA claims were provided to DOI/USFWS.

In addition to those costs that are detailed on Table 2, EPA's documentation supporting EPA's claim for reimbursement of funds provided to ADLC pursuant to the ADLC State Cooperative Agreement (SCA)(V97833901) is incomplete. As set forth in documentation provided with the United States' October 1, 2012 letter, EPA seeks recovery of \$3,876,911.12 from AR as funds provided to ADLC during the operative time period under SCA V97833901. EPA has produced 16 progress reports in support of its claim for recovery of the ADLC costs. Seven (7) of the reports together show distribution of \$1,588,000 of the \$3.8 million total as Contract costs paid to Kuipers and Associates. An additional \$83,000 is accounted for as ADLC

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expenditures. The remaining Nine (9) of the 16 progress reports include no cost tables explaining expenditure of SCA funds provided to ADLC. Thus, EPA's documentation fails to account for approximately \$2,206,000 of EPA's funding to ADLC during the operative time period.

A spreadsheet summary supporting AR's review of EPA's documentation provided for the ADLC SCA is included as Exhibit 1 to this letter, along with the cost tables from the progress reports. ADLC staff costs, apparently funded through the Kuiper's payments from ADLC, are highlighted in purple. The Kuiper's payments cover only the July 2006 – December 2006 period. Further documentation of Kuiper's payment of ADLC staff costs has not been provided to AR. In sum, EPA's documentation fails to describe the response actions taken by ADLC with funds it received under SCA V97833901, or support EPA's claim for recovery of those funds from AR.

Consistency with NCP

(i) A1 Lumber Parcel

EPA seeks to recover \$475,000 for response actions performed on the A1 Lumber parcel that was transferred to ADLC by AR under the terms of the 1994 Conveyance Agreement. The terms of the 1994 Conveyance Agreement and the cleanup requirements for the A1 Lumber Parcel were acknowledged and accepted by the United States under the terms of the Agreement and Covenant Not to Sue, EPA Docket No. CERCLA 94-12 (April 1994). EPA subsequently elected to ignore the approved remedy, and commitments made by the parties under the 1994 agreements. Thus, AR challenges \$400,000 of EPA's claim for costs expended on cleanup that was not necessary, as the cleanup performed was neither required by nor consistent with the Old Works East Anaconda Development Area (OW/EADA) remedy and EPA's approved work plan for the property.

The A1 Lumber parcel was subject to the cleanup requirements for open space property under the OW/EADA ROD. Response actions for the property were completed by AR under the Agency-approved A1 Lumber Parcel Remedial Action Work Plan (ARCO, July 1997). As set forth in the 1994 Conveyance Agreement between AR and ADLC, the parties agreed that the property "owner shall be solely responsible for any additional remediation that may be necessary to accommodate Future Development of the Property." *See* Section 7.2(i)(4). In August 2002, EPA, in consultation with MDEQ, approved the Final Old Works Industrial Area Remedial Action Work Plan / Final Design Report. That Report accurately described the status of the A1 Parcel as follows: "Proposed Action: No further action. Removal of miscellaneous waste along roadway was completed through an agreement with ADLC. Future actions, if necessary, are to be implemented by the developer through DPS."

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Subsequent data collection activities showed the presence of Arsenic in soils above the commercial action level (500 ppm). Notwithstanding the prior agreement that open space action levels would be protective pending County acceptance of a specific development plan for the property, EPA rejected AR's limited removal approach, proposed in January 2009, to address soils that exceeded the commercial action level. EPA instead demanded stripping of soils across the property to a depth of 6" and import of clean backfill. AR thereafter proposed a residential-based cleanup (250 ppm) approach that would have been fully protective pending development. In March 2009, EPA proceeded with its plan and demands recovery of \$470,000 for that action. AR's proposed cleanup approach would have far exceeded that required by the OW/EADA ROD prior to development, and is estimated to have cost \$70,000. Thus, AR challenges \$400,000 of EPA's \$470,000 demand as unnecessary costs that are not recoverable. To date, the property remains zoned commercial and no specific development plan has been prepared or approved by the County.

(ii) ADLC Funding of Kuipers' and Associates (K&A)

As described in the first section of this letter, ADLC's documentation, which EPA relies upon to support EPA's claim for recovery of \$3,876,911 in funds provided to ADLC over the 2002 – 2010 period, is incomplete. From the documentation provided by EPA, \$1,671,000 of the funds EPA claims ADLC received are accounted for; \$1,588,000 of that sum was paid to K&A by ADLC from January 1, 2007 through March 31, 2009. From the text presented in the ADLC progress reports received from EPA, K&A was ubiquitously present in Anaconda as an ADLC contractor from at least January 1, 2007 through December 2010. In the absence of EPA documentation to the contrary, AR presumes that the unaccounted funds provided to ADLC were also used primarily to compensate K&A.

Given the dearth of relevant documentation, AR is unable to account for sums paid to K&A for any specific "response" activity with the exception of staffing costs discussed under Cost Documentation heading in this letter. What is known, however, is that tasks completed by K&A for ADLC were not necessary, failed to conform to agency-approved work plans, were largely duplicative of work AR or EPA performed and sought to undermine the Anaconda Site ROD remedies.

By way of example, funds provided to ADLC were used to pay for the following K&A activities which are not recoverable because such costs were not incurred by EPA for lawful response actions, as authorized by the NCP and CERCLA:

- Monthly Well Sampling (WET and K&A); Yard Sampling that did not comply with approved SAP

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- XRF Machine purchase / Duplicative & Unnecessary soil sampling
- Ambient Air monitoring (RDU 8) / Duplicative of AR air monitoring
- Dust Collection Sampling / Unnecessary & litigation support for community claims
- K&A Staff attendance at AR/EPA/ADL meetings / Duplicative oversight
- K&A oversight for AR sampling / NWE soils handling / Duplicative oversight
- Separate GIS, duplicative of AR's Geocortex / Duplicative and Unnecessary
- Preparation of "design documents" for Sheep Gulch stormwater, waterline, NWE project and IICP / Unnecessary and Duplicative
- Funding of non-Superfund activities (e.g. growth plan, other ADL consultants) / Not a response action or cost
- Purchase of K&A computer systems / software / office furniture and supplies / Not a response action or cost
- K&A and those engaged by K&A sought to undermine the Anaconda ROD remedies through public presentations and other activities, all of which resulted in unnecessary AR and EPA expenditures (e.g., February 25, 2007 Memorandum commissioned by K&A from SRA International, Inc. which challenged EPA's human health risk assessment and the 250 ppm Arsenic action level for residential soils)

During the period from 2002 through 2010, AR provided \$1,300,000 in direct funding to ADLC for superfund-related ICs support costs (e.g., staffing) and other County response expenditures and activities. To give context to this level of funding, AR provided a comparable level of funding to Butte-Silver Bow County ("BSB") during this same period and fully funded BSB's superfund management activities during that period. Notwithstanding AR's objections to EPA's continued unnecessary funding of ADLC / K&A activities, K&A remained ADLC's contractor until 2011. Not coincidentally, K&A's involvement at Anaconda ended with EPA's decision to terminate "grant" funding to ADLC.

Independent from any XRF sampling completed by the County, AR performed all data collection activities required to support response actions during the operative period. Oversight of AR's response activities was provided by EPA, MDEQ or their respective contractors. In sum, little if anything of value in terms of support for the superfund process at the Anaconda Site may be attributed to the efforts of K&A as ADLC's contractor.

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### Analysis and Argument

Unnecessary, duplicative, and undocumented costs such as those described above are not recoverable because they are inconsistent with the NCP. “Costs that are unnecessary and excessive in light of the National Contingency Plan are arbitrary and capricious and should be disallowed.” *United States v. EI Dupont de Nemours & Co.*, 432 F.3d 161, 179 (3d Cir. 2005). Costs incurred at an NPL site for activities that duplicate work performed by a PRP exemplify the type of unnecessary costs that are not recoverable.

For instance, in *United States v. Newmont USA, Ltd.*, the court denied summary judgment as to EPA cost recovery claims because the PRP “sufficiently raised a genuine issue on inconsistency with the NCP as to [EPA costs] alleged to have been unnecessary and duplicative.” 504 F. Supp. 2d 1077, 1085 (E.D. Wash. 2007). The problem in *Newmont* was that EPA undertook a sampling plan that duplicated the PRP’s sampling, *id.* at 1083-84, the very same problem that exists with amounts paid to K&A for ADLC’s duplicative sampling programs at the Anaconda Site. *See also United States v. Iron Mtn. Mines, Inc.*, 987 F. Supp. 1263, 1272 (E.D. Cal. 1997) (costs for a duplicative modeling program not recoverable); *Louisiana Pacific v. Beazer Materials & Svcs.*, 811 F. Supp. 1421 (E.D. Cal. 1993) (costs for duplicative sampling program not recoverable). Similarly, the costs claimed for K&A’s oversight of AR’s sampling programs and K&A’s attendance at meetings among AR, EPA, and ADL duplicate the costs EPA itself incurred fulfilling its own oversight responsibilities and are also not recoverable.

Costs paid to ADLC for K&A’s activities also are inconsistent with the NCP because K&A’s ultimate purpose was to challenge work AR performed pursuant to final EPA decisions. The regulations governing Technical Assistance Grant (TAG) funding specifically disallow funding for “reopening or challenging final EPA decisions such as Records of Decision.” 40 C.F.R. § 35.4075(i). Although EPA has never specifically designated its funding of K&A through the ADLC as a TAG, it is unclear what other basis EPA would have for the funding and what legitimate funding process would provide for costs to challenge work performed under EPA oversight and pursuant to final EPA decisions.

Finally, EPA’s insufficiently documented costs related to the Anaconda Site are also inconsistent with the NCP. The NCP specifically requires that EPA “complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery.” 40 CFR § 300.160(a)(1). At minimum, such cost recovery documentation must identify “the response action taken,” and must include an “accurate accounting of federal, state, or private party costs incurred for response actions.” *Id.* As described above, the progress reports associated with many of EPA’s claimed costs either do not indicate what work was performed during the time period at issue, or indicate that no work at all was performed during the claimed time period. These undocumented costs are also not recoverable.

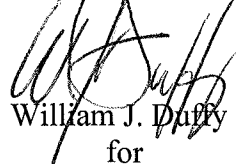
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Summary

The United States' past cost demand related to the Anaconda Site, as presented in EPA's October 1, 2012 letter, is \$23,266,422.20 covering the period from August 1, 2002 through December 31, 2010. For the reasons set forth in this letter and discussed at our February 6<sup>th</sup> meeting, EPA's claim for recovery of \$6,550,000 of the total demand is without merit. This sum includes \$4,890,831 in direct charges and \$1,662,883 in Indirect Costs. The latter figure has been estimated based upon an average (34%) of the annual indirect cost multipliers EPA utilized over the operative period. Atlantic Richfield is not challenging EPA's methodology for calculation of indirect costs, but objects to paying any indirect costs that are a product of EPA's claim for costs that are not recoverable.

AR offers this letter and the positions set forth in this writing in an attempt to resolve the US cost claims through compromise and settlement. In the event the present negotiations are unsuccessful, additional or different positions may be advanced in litigation of the US claims. We are prepared to meet with the United States representatives at your convenience to discuss the matters addressed in this letter and conclude our negotiations.

Sincerely,



William J. Duffy  
for

DAVIS GRAHAM & STUBBS LLP

WJD:lg

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# Table 1

## Summary of AR's Anaconda Site Cost Challenges

### Cost Documentation

Duplicate Charge	2	\$17,909	Voucher #81 allocated twice
Charges under review	2	\$142,407	Still being reviewed by EPA
	2	\$454,443	Level of activity shown in FWS progress reports do not support demand
Undocumented Charges			
Undocumented Charges		[\$2,288,528]	Inadequate progress reports/explanation of ADLC expenditures (V97833901)
Sub Total		\$2,903,287	

### Inconsistent with NCP

Work beyond EPA Remedy	3 & 4	\$400,000	A1 Lumber - Commercial vs. Residential
Duplicate / Unnecessary Activity	5	\$3,876,911	ADLC - Kupiers (Subsumes challenge to ADLC expenditures above [\$2,288,528])
Sub Total		\$4,276,911	
Total		\$4,891,670	
Indirect Costs (avg 34%)		\$1,663,168	
Grand Total (Approximate)		\$6,550,000	

SUBMITTED PURSUANT TO FRE 408 AND COURT CONFIDENTIALITY ORDER  
CBI PROTECTED INFORMATION



## Table 2

### Cost Documentation – MDEQ and DOI Interagency Agreements

<u>Voucher Number</u>	<u>Agency</u>	<u>Treasury Number</u>		
810302402BV	MDEQ	3308SV290	\$99,902	Unusually large in relation to other quarters
810302402A3	MDEQ	70053012594	\$42,505	Unusually large in relation to other quarters
			\$142,407	
13303739	DOI-USFWS	270315551	\$25,000	FWS progressreport doesn't support charge
13315648	DOI-USFWS	270537669	\$31,643	FWS progressreport doesn't support charge
2714 6	DOI-USFWS	27071086	\$209,246	FWS progressreport doesn't support charge
13325083	DOI-USFWS	270854453	\$35,039	FWS progressreport doesn't support charge
			\$300,928	
13327034	DOI-USFWS	270857281	\$5,673	FWS progressreport shows covering this period show
2714 6A	DOI-USFWS	27090272	\$72,000	minimal site activity
2714 6B	DOI-USFWS	27090272	\$204	
2714 6C	DOI-USFWS	27090334	\$1,275	
2714 6D	DOI-USFWS	27090516	\$19,584	
2714 6E	DOI-USFWS	27090516	\$323	
2714 6	DOI-USFWS	27090607	\$38,905	
2714 6	DOI-USFWS	27090612	\$15,552	
			\$153,516	
			\$596,851	

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